UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL–CIO
(FCA US LLC)

Cases 07–CB–213726
07–CB–213747
07–CB–213749

and

SHERI ANOLICK, BRIAN KELLER, AND BEVERLY SWANIGAN

Larry A. "Tony" Smith, Esq. for the General Counsel.

Abigail V. Carter, Esq., *Philip C. Andonian, Esq.*, and *Elizabeth Oppenheimer, Esq. (Bredhoff & Kaiser, PLLC)* of Washington, D.C. for the Respondent.

James C. Baker, Esq. (*Sterling Attorneys at Law, PC)* of Bloomfield Hills, Michigan for the Charging Parties.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case involves shocking allegations that representatives of Fiat Chrysler Automotive (FCA) unlawfully bribed agents of the United Auto Workers (UAW) international union to the tune of over a million dollars from 2010 to 2015. The General Counsel's complaint alleges that high-ranking FCA supervisors provided "financial inducements" to high-ranking UAW agents by diverting funds from the UAW-Chrysler National Training Center (NTC). Pursuant to the parties' collective-bargaining agreement, FCA financed the NTC to provide job and other training to bargaining-unit

employees. The complaint alleges that FCA supervisors authorized UAW agents to charge personal expenses on NTC credit cards. It also alleges that FCA supervisors paid the salaries of UAW officials on the union's national negotiation committee utilizing NTC funds, even though those officials were not assigned to work for the NTC. Union officials allegedly received and accepted these bribes during a time period when FCA and the UAW twice negotiated successor collective-bargaining agreements covering unit employees. The General Counsel alleges that, by this conduct, the UAW breached its duty of fair representation and fiduciary duty to those employees, as well as engaged in conduct inherently destructive of employees' rights, in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the NLRA or the Act).

The focus of this case should be on the substance of these appalling allegations and whether the General Counsel has met the burden of proof to establish a violation of Section 8(b)(1)(A). But the substance of those allegations ends up playing little part in this decision. Instead, this case is almost entirely about how the General Counsel attempts to sustain the burden of proof.

In July 2018, the United States Department of Justice (DOJ) began indicting many FCA and UAW officials, alleging that they had engaged in a criminal conspiracy to violate the Labor Management Relations Act (LMRA), including by making and receiving the payments alleged as unlawful in this case. The LMRA amended the NLRA to include, among other things, a ban on prohibited payments from employer representatives to union representatives who represent the employer's employees. On different dates from August 8, 2017 to April 2, 2019, four UAW officials and three FCA officials entered into plea agreements with DOJ which the U.S. District Court for the Eastern District of Michigan approved. Three UAW officials and one FCA official pleaded guilty to conspiring to violate the LMRA. The other three officials pleaded guilty to either tax-related crimes or failure to report the criminal conspiracy to authorities. Each plea agreement contains statements setting forth the factual basis for the guilty plea. For those charged with a conspiracy offense, the agreements also detail overt acts in furtherance of the conspiracy, one of which is a necessary element to proving the conspiracy's existence.

At the hearing in this case, the General Counsel chose not to call any witnesses to testify concerning the complaint's substantive allegations against the UAW. This included not calling any of the individuals who pleaded guilty to conspiring to violate the LMRA by making and receiving prohibited payments. Instead, the General Counsel sought to enter all of the plea agreements into evidence, then utilize the factual statements therein to meet the burden of proof for establishing an 8(b)(1)(A) violation. Prior to the hearing, the UAW filed a motion in limine, which I took under advisement, seeking to exclude the plea agreements as substantive evidence, claiming the statements therein are hearsay. In response, the General Counsel argues that precedent of the National Labor Relations Board (the Board) and multiple federal rules of evidence permit the admission of the plea agreements for the truth of the matters asserted.

Shortly after the passage of the NLRA, the Board ruled in *Republic Steel Corp.*, 9 NLRB 219, 387–388 (1938), that convictions and guilty pleas for acts of violence were admissible in lieu

of live testimony. However, the holding was limited to the legal question of whether strikers who had engaged in criminal conduct were entitled to be reinstated after an employer unlawfully ended their employment, a remedial question. The Board explicitly noted that its ruling did not apply to live testimony addressing the issue of whether the employer had committed unfair labor practices under the Act. That issue was "direct, not collateral" and the Board's "proper duty to determine." More recently, the Board has indicated its continued preference for the live oral testimony of witnesses in unfair labor practice hearings. *Westside Painting*, 328 NLRB 796, 796–797 (1999). The reasons are obvious. Live testimony is the best evidence to enable the Board and judges to fulfill their duty to determine whether a respondent has violated the Act. It ensures a respondent is treated fairly and with due process, including being able to cross examine witnesses. It enables judges to observe witnesses' testimony and assess their credibility. Unsurprisingly, then, the Board has never, to my knowledge, issued a decision permitting the General Counsel to use hearsay factual statements in documents and nothing more to prove that a respondent violated the NLRA. I decline to do so here. In so concluding, I recognize that the Act states the federal rules of evidence should be followed "so far as practicable" in unfair labor practice proceedings. However, where, as here, the General Counsel's case rests entirely on hearsay documents, I find that strict adherence to those rules is required. Under Federal Rule of Evidence 803(22), the judgments of conviction for the FCA and UAW officials are admissible as substantive evidence. But neither Board precedent nor the federal rules of evidence relied upon by the General Counsel permit the admission of the factual statements in the plea agreements as substantive evidence under the circumstances of this case. Therefore, I grant the Respondent's motion to exclude the plea agreements. Taking nothing away from the seriousness of the allegations in this case, I further find that the judgments of conviction, standing alone, are insufficient to establish the alleged 8(b)(1)(A) violation. Because the General Counsel has not met the burden of proof, the complaint is dismissed.[1]

ALLEGED UNFAIR LABOR PRACTICES

On August 28 and September 10, 2020, via videoconferencing, I conducted a trial on the complaint. On October 15, 2020, the General Counsel and the Respondent filed post-hearing

[1] On February 19, 2020, the General Counsel, through the Regional Director for Region 7 of the Board, issued a consolidated complaint against the International Union, United Automobile, Aerospace & Agricultural Workers of America, AFL–CIO (the Respondent, the Union, or the UAW) in Cases 07–CB–213726, 07–CB–213747, and 07–CB–213749. (GC Exh. 1(y).) On June 18 and August 27, 2020, the General Counsel issued a first and a second amended consolidated complaint. (GC Exhs. 1(kk) and 1(ccc).) The General Counsel's complaints were premised upon unfair labor practice charges and amended charges filed by Charging Parties Sheri Anolick, Brian Keller, and Beverly Swanigan on January 26, 2018 and February 11, 2020. (GC Exhs. 1(c), 1(g), 1(k), 1(o), 1(s), and 1(w).) On March 4, August 21, and August 28, 2020, the Respondent filed answers to the complaints, denying the substantive allegations and asserting numerous affirmative defenses. (GC Exhs. 1(cc), 1(oo), and 1(hhh).) In its answer to the second amended consolidated complaint, the Respondent admitted that the Board has jurisdiction in this case, FCA US LLC (FCA) is a Sec. 2(2), (6), and (7) employer, and the Respondent is a Sec. 2(5) labor organization.

The consolidated complaints also named FCA as a respondent in lead case number 07–CA–213717. On August 27, 2020, the Regional Director for Region 7 severed from this proceeding the cases where FCA was the respondent.

briefs and on November 5, 2020, the Respondent filed a response brief. On the entire record and after considering those briefs, I make the following findings of fact and conclusions of law.[2]

FINDINGS OF FACT

FCA is engaged in the business of the manufacture, nonretail sale, and distribution of automobiles and automotive products throughout the United States. From 2009 to June 2015, Alphons Iacobelli was FCA's vice president of employee relations. From 2009 to May 2016, Michael Brown was FCA's director of employee relations.

The UAW represents three bargaining units at FCA: engineering; office and clerical; and production, maintenance, and parts. At times material to this case, the collective-bargaining agreements covering these units ran from October 12, 2011 to September 14, 2015. The engineering unit and office and clerical unit also had contracts which ran from October 22, 2015 to September 14, 2019. From January 2010 to June 2014, General Holiefield was the Respondent's vice president of the UAW Chrysler department. From January 2014 to June 2014, Norwood Jewell was a regional director for the Respondent and, from June 2014 to December 2016, Jewell replaced Holiefield as the Respondent's vice president of the UAW Chrysler department. From January 2010 to January 2012, Keith Mickens was the assistant director of the UAW Chrysler Department. From January 2012 to June 2014, he worked as an administrative assistant in the same department and, from June 2014 to December 2015, he was a servicing representative for the Respondent. Virdell King replaced Mickens as the assistant director of the UAW Chrysler Department from January 2012 to February 2016. Finally, from June 2014 to December 2016, Nancy Johnson was a top administrative assistant for the Respondent.[3]

Charging Party Brian Keller has worked for Chrysler/FCA since June 7, 1999. He currently works as a quality inspector who checks parts under warranty with defects in them at FCA's quality engineering center in Auburn Hills, Michigan. Charging Party Beverly Swanigan has worked for Chrysler/FCA for more than 20 years, currently as a stock keeper who stocks shelves at the company's Center Line, Michigan facility. Charging Party Sheri Anolick also has

[2] In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

[3] In its answer to the second amended consolidated complaint, the Respondent admitted that Holiefield, Jewell, Mickens, King, and Johnson were Sec. 2(13) agents of the Union in their named positions and while they were performing the duties of those positions during the time periods alleged. (GC Exh. 1(hhh).) However, the Respondent denied that they were agents for all of the acts they took while holding their UAW positions and that certain actions they took were outside the scope of their authority. The Respondent also admitted that Iacobelli and Brown were Sec. 2(13) agents of FCA with the same limitations that the Respondent asserted for Holiefield, Jewell, Mickens, King, and Johnson.

worked for Chrysler/FCA for more than 20 years, currently as a stock keeper from a facility in Romulus, Michigan. All three employees are represented by a UAW local and have been members of the UAW for the entirety of their employment.

A. The National Training Center and Joint Activities Board

The collective-bargaining agreements between FCA and the Respondent contain a memorandum of understanding (MOU) providing for employee training through the UAW/Chrysler National Training Center (NTC). NTC provides job training and other programs, including on manufacturing efficiency, product quality improvement, and health and safety. NTC is a separate legal entity from the UAW with its own staff and facilities, including accounting and human resources departments. The collective-bargaining agreement requires FCA to fund the NTC with contributions based upon employee hours worked. The contract also assigns the responsibility for directing and supporting the NTC to a joint activities board (JAB). That board is co-chaired by FCA's vice president of employee relations and UAW's vice president of the Chrysler department. The co-chairs each appoint four board members from their organizations. The members must have a position with either FCA or the Respondent and would be removed from JAB if they lost those positions. JAB's duties include considering and approving training program funding requests from departments within the NTC, as well as monitoring NTC expenses for those programs. Once a request is approved, NTC's accounting controller asks for funds from FCA. Except for the JAB board members, neither FCA nor UAW officials are permitted to see the NTC's finances.[4]

Pursuant to the MOU, Iacobelli served as the co-chair of JAB when he was the vice president of employee relations for FCA and Holiefield served as the co-chair of JAB when he was the vice president of the UAW Chrysler department for the Respondent. Their terms overlapped from approximately January 2010 to June 2014. Jewell was the co-chair of JAB as the vice president of the UAW Chrysler department from June 2014 to December 2016. As for JAB members, Iacobelli appointed Jerome Durden, who was employed by the NTC as controller, as secretary of the board from 2009 to June 2015.[5] Holiefield's appointed JAB board members included King, who served from January 2012 to February 2016, and Mickens, who served from January 2010 to December 2015.[6]

When a UAW representative serves on the JAB or performs other work for the joint programs, the NTC charges back, or reimburses, the UAW for wages and other compensation

[4] GC Exhs. 2 (contract pp. 125–135), 4 (contract pp. 116–125), 8 (contract pp. 121–128), 11, and 12; Tr. 157–158, 173–176, 192–194, 196–198, 205–209.

[5] Other than in the plea agreements, Durden's position with FCA is not established in the record.

[6] Tr. 164–168; Respondent's answer to the second amended consolidated complaint, paragraphs 6 and 7. (The answer, which was filed on the first day of hearing, inadvertently was omitted from the formal papers. I now admit that answer as GC Exh. 1(hhh).)

costs due to that work. For example, King and Mickens worked entirely on NTC joint programs in 2011. Thus, the NTC paid for their salaries.[7]

B. The Respondent's Process for Contract Negotiations with FCA

FCA and the UAW negotiated successor collective-bargaining agreements in 2011 and 2015. The Respondent engages in pattern bargaining with the "Big 3" automakers—FCA, Ford, and General Motors (GM). It picks one of the three companies with which to begin negotiations and, after reaching an agreement, uses the contract as a starting point for the remaining two automakers. The first company chosen is called the "strike target," i.e. to strike a contract. In 2011, the Union picked GM as the strike target. In 2015, it picked FCA. The Union begins preparations for negotiations about a year and a half before they begin. To formulate bargaining demands, multiple international union departments study the financial health of the Big 3. They also study current employee benefits at those companies and other car manufacturers with whom they do not bargain. Local UAW unions also solicit from their members what they would like to see in a new contract. Resolutions from those solicitations then are forwarded to a union sub-council, which in turn forwards the resolutions to the entire council made up of top local union leadership throughout the country. The council turns the resolutions into contract demands and presents those demands to one of the employers at the start of negotiations.[8]

The Respondent's national bargaining team is made up of the UAW's president and vice president; staff from the president's office; international staff who work for the vice president assigned to bargain a particular agreement; and local leadership elected by their peers from the sub-councils. The president makes initial decisions with input from the bargaining team concerning which proposals to accept, withdraw, or compromise on. Any accepted agreement is submitted for approval to the national bargaining team. If approved by the team, a tentative agreement is created and submitted to the international executive board. That board is comprised of eight regional directors and the international's president, three vice presidents, and secretary-treasurer. If approved by the board, the agreement goes to the Chrysler council, made up of local leadership throughout the country. If approved by the council, the agreement is submitted to the membership for a ratification vote.[9]

In conducting these negotiations and with respect to all other job duties as a UAW representative, the Respondent's officials are covered by an "ethical practices" code contained in the UAW constitution.[10]

[7] Tr. 165–169.

[8] Tr. 158–162, 186–192.

[9] Tr. 162–164.

[10] Tr. 178–181; R. Exhs. 28–30.

C. The Criminal Indictment of Iacobelli on July 26, 2017

On July 26, 2017, the United States Department of Justice (DOJ) filed a grand jury indictment against Iacobelli in the U.S. District Court for the Eastern District of Michigan.[11] Iacobelli's indictment charged him with eight counts of criminal activity, including conspiracy to violate the LMRA; two counts of paying and delivering prohibited money and things of value to a union official; conspiracy to defraud the United States; and subscribing multiple false tax returns. The indictment initially noted that the LMRA prohibits employers from paying money or other things of value to any officer of a labor organization representing its employees, as well as prohibits union officers from accepting such payments.[12] It further stated that one of the purposes of the LMRA was to "combat the corruption of the collective bargaining process that occurs when a union employer gives something of value to a union representative." The indictment also described how the UAW represented thousands of FCA employees nationwide, that FCA and the UAW had negotiated national collective-bargaining agreements covering those workers in 2011 and 2015, and that Iacobelli and Holiefield were the senior officials for FCA and the UAW responsible for negotiating and administering those contracts. The indictment went on to allege that Iacobelli and other FCA officials had utilized the NTC to pay more than $1.2 million in prohibited payments and things of value to Holiefield and other UAW officials from January 2009 to July 2015. The list included personal travel, designer clothing, furniture, jewelry, and paying off the $262,219 mortgage on Holiefield's home. The indictment further alleged that Iacobelli and other FCA officials provided credit cards linked to NTC accounts to Holiefield and other UAW officials for their use on personal expenses, the goal of which was to keep the union officials "fat, dumb and happy." The indictment alleged that Iacobelli and other FCA officials also directed hundreds of thousands of dollars in NTC funds to companies and a purported charity controlled by Holiefield and his wife, Monica Morgan.[13] The indictment stated that the FCA officials viewed some of these payments as "an investment in 'relationship building' with . . . Holiefield." However, the indictment did not contain any allegations that the prohibited payments specifically impacted the collective-bargaining agreements reached in 2011 or 2015.[14]

On the same date that the DOJ indicted Iacobelli, The Detroit News newspaper published a detailed article about the allegations in the indictment. In describing the alleged prohibited credit card payments, the article stated that the payments would have come when Iacobelli was in charge of bargaining for FCA and Holiefield was in charge of bargaining for the

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[11] I take administrative notice of the indictment against Iacobelli in *United States of America vs. Durden et al.*, No. 17–CR–20406–PDB–RSW–2 (E.D. Mich. 2017), ECF No. 4. See, e.g., *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2 fn. 3 (2017); *Atelier Condominium*, 361 NLRB 966, 967 fn. 12 (2014). In doing so, I note the indictment contains nothing more than the DOJ's allegations against Iacobelli.

All dates hereinafter are in 2017, unless otherwise specified.

[12] 29 U.S.C. § 186.

[13] The indictment also charged Morgan with four counts of criminal activity involving the filing of false tax returns and the willful failure to file a tax return. Morgan was married to Holiefield until the latter's death in 2015.

[14] Iacobelli indictment.

UAW. The article concluded with a quote from a statement by the FBI agent in charge of the Detroit Division, in which he said the prohibited payments "call[] into question the integrity of contracts negotiated during the course of this criminal conduct."[15]

That same day, then UAW President Dennis Williams sent a letter to all of the Respondent's international staff, local leadership, and members, notifying them of the indictment. Williams denied that the current UAW leadership had any knowledge of the fraudulent activities contained in the indictment. However, he stated the Respondent nevertheless took responsibility for not doing more to exert its influence over the governance policies of the NTC, which might have uncovered the corruption sooner. He further noted that the diverted NTC funds were monies funded by FCA to the training center, not union funds or dues from unit employees. Williams also stated: "It is important for you to know that despite some public commentary to the contrary, the allegations in the indictment in no way call into question the collective bargaining contracts negotiated by our union during this period." Williams went on to describe "active measures" the Respondent was taking to prevent such misconduct in the future, listing 10 different steps. He further noted the Respondent had hired outside counsel to conduct an internal investigation into the allegations.[16]

Unit employees Keller and Swanigan learned of Iacobelli's indictment on July 26. Unit employee Anolick learned of the allegations at some point later, in the fall of 2017.[17]

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[15] R. Exh. 23.

[16] R. Exh. 31; Tr. 182. The record does not establish when the UAW learned of the DOJ's investigation or the criminal allegations, but Williams' letter suggests it occurred prior to Iacobelli's indictment.

[17] Tr. 50, 55–56, 62–63, 99–100. I credit Anolick's uncontroverted testimony that she learned of the indictment's allegations in the fall of 2017. (Tr. 122–123, 137–148.) On this topic, Anolick's demeanor under repeated questioning from the Respondent's counsel was indicative of reliable testimony. She appeared frank and sincere in admitting she could not remember the specific date she learned of the allegations, but consistently asserted it occurred in the fall of 2017. Moreover, Anolick filed a previous charge with the Board on November 21, 2017, which alleged that FCA and the UAW had been "colluding and agreeing to terms and conditions of employment because of a bribery scheme." The timing of this charge filing is consistent with Anolick's testimony regarding when she learned of the allegations. I further note that Anolick was not questioned about whether she received or read the July 26, 2017 letter from UAW President Williams to all union members describing Iacobelli's indictment. Anolick also testified that she learned of the allegations from watching television news, not reading a newspaper article. Thus, her testimony does not establish that she read the July 26, 2017 Detroit News article. Finally, I acknowledge that the Charging Parties, in a related federal lawsuit against FCA and the UAW, asserted in their complaint that the "plaintiffs did not discover evidence of FCA's violation of the LMRA and the UAW's breach of its duty of fair representation until the public filing of a federal indictment against Iacobelli…" Am. compl. ¶ 92, *Swanigan v. FCA US, LLC*, No. 18–CV–10319 (E.D. Mich. 2018), ECF No. 22–3. Assuming arguendo that this pleading is an admission of a party opponent and can be utilized for the truth of the matter in this case (see, e.g., *Ross v. Philip Morris & Co.*, 328 F.2d 3, 14–15 (8th Cir. 1964)), the text is insufficient to establish, as the Respondent argues, that Anolick had actual notice on July 26, because the allegation is generalized in nature.

D. The Plea Agreements of FCA and UAW Officials from August 8, 2017 to April 2, 2019[18]

On August 8, DOJ filed a plea agreement for Durden, the controller of the NTC and an FCA representative on JAB from 2009 to June 2015.[19] Durden pleaded guilty to two counts of federal-tax-related crimes. The first was conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the Internal Revenue Service (IRS) from ascertaining, computing, assessing, and collecting taxes. The second was willful failure to make and file an individual tax return. On the two counts, Durden faced a maximum imprisonment time of 6 years total.

On August 29, DOJ filed a plea agreement for King, the Respondent's assistant director of the UAW Chrysler department and a JAB appointee from January 2012 to February 2016.[20] King pleaded guilty to conspiracy to violate the LMRA in violation of 18 U.S.C. § 371.[21] The plea listed the elements of that offense as:

> (1) Two or more persons conspired to violate the LMRA in violation of 29 U.S.C. § 186(a)(2), (b)(1), and (d)(1).
>
> (2) The defendant knowingly and voluntarily joined the conspiracy.

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[18] The findings of fact in this section reflect the contents of those plea agreements which the General Counsel relies upon in support of the complaint allegations. As will be discussed fully in the Analysis section of this decision, the parties dispute whether the referenced plea agreements are admissible evidence in this case for the truth of the matters asserted therein. I do take administrative notice of the dockets of each criminal case, but only for the purpose of the case activities and their timeline.

[19] GC Exh. 15.

[20] GC Exh. 16.

[21] 18 U.S.C. § 371 is the Federal law which contains a general prohibition on conspiring to commit an offense or to defraud the United States. The statute states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Furthermore, the LMRA specifically prohibits employer payments to any labor organization or a representative of employees. As will be relevant here, 29 U.S.C. § 186(a)(2) prohibits an employer or employer representative from paying, lending, delivering, or agreeing to pay, lend, or deliver any money or other thing of value to any labor organization or officer or employee thereof which represents any of the employer's employees. Likewise, 29 U.S.C. § 186(b)(1) makes it unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment prohibited by 29 U.S.C. § 186(a). Finally, 29 U.S.C. § 186(d)(1) sets forth the penalties for violating 29 U.S.C. § 186(a)(2) and (b)(1).

> (3) A member of the conspiracy did one of the overt acts described in the Second Superseding Information for the purpose of advancing or helping the conspiracy.

The factual basis for the guilty plea stated that, from 2012 to 2016, King was part of a conspiracy whereby officers and employees of UAW accepted money and other things of value diverted from the NTC by persons acting in the interest of FCA. Specifically, Iacobelli, Durden, and other FCA co-conspirators used NTC bank accounts to make prohibited payments to UAW officials Holiefield, King, and others. In addition, Iacobelli permitted UAW officials to charge personal expenses on NTC credit cards. King faced a maximum prison sentence of 5 years.

On January 23, 2018, DOJ filed Iacobelli's plea agreement, in which he pleaded guilty to two counts: conspiracy to violate the LMRA in violation of 18 U.S.C. § 371 and subscribing a false tax return in violation of 26 U.S.C. § 7206(1).[22] The factual basis for his guilty plea stated that, from January 2009 to June 2015, Iacobelli joined a conspiracy in which FCA made payments and gifts worth more than $1.5 million to Holiefield, King, and other UAW officials, using both NTC bank and credit card accounts. Portions of those monetary transfers purportedly were reimbursements for the salaries of UAW employees assigned to the NTC. However, none of those UAW employees provided NTC services. Rather, the salary transfers were a "political gift" from FCA to Holiefield. Finally, noting that FCA and the UAW engaged in national contract negotiations in 2011 and 2015 with Iacobelli as FCA's lead negotiator, the factual basis section further stated that Iacobelli and his FCA co-conspirators made the payments to UAW officials to:

> obtain benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective-bargaining agreements between FCA and the UAW.

No further details were provided. The maximum prison sentence Iacobelli faced was 8 years total.

On April 5, 2018, the DOJ filed a plea agreement for Mickens, who served in a variety of positions for the UAW from 2010 through 2015 and was a JAB member during that time period.[23] Mickens pleaded guilty to conspiracy to violate the LMRA in violation of 18 U.S.C. § 371. The factual basis for the plea stated that, from June 2010 through December 2015, Mickens joined a conspiracy to receive money and other things of value from Iacobelli, Durden, and other FCA co-conspirators, using NTC bank accounts and credit cards. It also stated that Mickens made thousands of dollars of purchases on his NTC credit cards to benefit other Union officials. Mickens faced a maximum prison sentence of 5 years.

[22] GC Exh. 17.

[23] GC Exhs. 1(hhh) (paragraph 7) and 19; Tr. 165–168. Mickens participated in contract negotiations in 2011, but only had administrative, not substantive, responsibilities.

On May 25, 2018, the DOJ filed a plea agreement for Michael Brown, the director of employee relations for FCA from 2009 to May 2016.[24] Brown pleaded guilty to misprision of a felony in violation of 18 U.S.C. § 4.[25] The factual basis for the plea stated that Brown was aware of the conspiracy to violate the LMRA, specifically that FCA officials had made prohibited payments to UAW officials and allowed UAW officials to use NTC credit cards for personal expenses. The factual basis also included that:

> Michael Brown knew that the purpose of the conspiracy to provide prohibited payments to UAW officials was to grease the skids in order to obtain benefits, advantages, and concessions in the negotiation, implementation, and administration of collective-bargaining agreements between FCA and the UAW.

The additional offense information section[26] stated:

> While he served as co-director of the NTC, Michael Brown and other FCA executives authorized hundreds of thousands of dollars in payments to the UAW, in the guise of reimbursements for 100% of the salaries and benefits the UAW paid to individuals placed on "special assignment" status to the NTC, knowing that a number of those individuals did little work or no work on behalf of the NTC.

Brown faced a maximum prison sentence of 3 years.

On July 23, 2018, the DOJ filed a plea agreement for Johnson, who worked as a UAW representative from June 2014 through December 31, 2016.[27] Johnson pleaded guilty to conspiracy to violate the LMRA in violation of 18 U.S.C. § 371. The factual basis section of the plea stated that Johnson joined the conspiracy so she and other union officials could receive money and things of value from persons acting in the interest of FCA. These payments were delivered by Johnson after she was authorized to use NTC credit cards for her personal expenses and the expenses of other union officials. The additional offense information section stated:

> During the period 2014 through 2016, 100% of the UAW salaries of a large number of UAW officials and employees,

[24] GC Exh. 20. Other than Brown's plea agreement, the record evidence does not establish Brown's position or involvement with the NTC.

[25] The elements of that offense are: (1) a federal felony was committed; (2) the defendant had knowledge of the commission of that felony; (3) the defendant failed to notify the relevant authorities as soon as possible; and (4) the defendant deliberately took an affirmative act to conceal the crime.

[26] This section contained facts not to be used to determine Brown's sentence per the plea.

[27] GC Exh. 21. The record evidence does not establish that Johnson had any role at or did work for the NTC.

> nominally assigned to the NTC, was paid for by FCA through the NTC. FCA paid these salaries for the UAW even though senior UAW officials and FCA executives both knew that these UAW officials and employees "assigned" to the NTC spent most of their work time performing tasks for the UAW, reported to the UAW, and enforced FCA' s compliance with the collective bargaining agreement on behalf of the union and not for the benefit of FCA or the NTC.

Johnson faced a maximum prison sentence of 5 years.

On August 27, 2018, the district court accepted Iacobelli's plea agreement. On September 13, 2018, the district court entered judgment finding Iacobelli guilty of conspiracy to violate the LMRA and subscribing a false tax return.

On November 7, 2018, the district court accepted Durden's plea agreement and entered judgment finding Durden guilty of conspiracy to defraud the United States (with respect to federal taxes) and willful failure to file a tax return. The court also accepted Mickens' plea agreement.

On November 13, 2018, the district court entered judgment finding Brown guilty of misprision of a felony. It also accepted King's plea agreement and entered judgment finding Mickens guilty of conspiracy to violate the LMRA. On November 21, 2018, the court entered judgment finding King guilty of conspiracy to violate the LMRA.

On December 18, 2018, the district court accepted Johnson's plea agreement. The court also entered judgment finding Johnson guilty of conspiracy to violate the LMRA.

Finally, on April 2, 2019, the DOJ filed a plea agreement for Jewell, who took over for Holiefield as vice president of the UAW Chrysler department from June 5, 2014 to December 31, 2016.[28] In that position, Jewell was the co-chair of the NTC during that same time period. Jewell pleaded guilty to conspiracy to violate the LMRA in violation of 18 U.S.C. § 371. The factual basis section of the agreement stated that, from 2014 through 2016, Jewell joined the conspiracy to receive things of value from persons acting in the interest of FCA, utilizing NTC bank and credit card accounts. It also stated that Jewell authorized other union officials to similarly utilize NTC accounts for their personal expenses. Unlike the other plea agreements, Jewell's contained a "Defendant's Position" section. In it, Jewell acknowledged his failure to properly apportion expenses to the UAW and the NTC. He denied that his conduct was influenced by the non-apportioned expenses and suggested his subordinates were responsible for some of the violations. Finally, Jewell stated: "[My] decisions during the 2015 collective

[28] GC Exh. 22.

bargaining negotiations were not affected by the activity described above or the efforts of Iacobelli." Jewell faced a maximum prison sentence of 5 years.

On August 5, 2019, the district court accepted Jewell's plea agreement. Two days later, the court entered judgment finding Jewell guilty of conspiracy to violate the LMRA.

E. The Respondent's Remedial Measures

After learning of the DOJ's allegations and Iacobelli's indictment, the Respondent conducted an internal audit which could not verify that NTC work had been performed by certain union appointees to the JAB, even though the NTC paid their salaries. Thus, the Respondent reimbursed the NTC for those expenses. It also implemented a number of changes to its business practices to prevent such conduct from occurring in the future. It hired an outside ethics officer who has full review of the union's actions.[29] It also created an ethics hotline which staff and members may utilize to anonymously raise ethics concerns without fear of retribution. The Respondent changed its financial auditing procedures to require a different auditor each year. It also trained its staff on how to appropriately follow its business practices. Finally, the Respondent's international executive board mandated that anyone found guilty of misappropriating funds had to resign from the Union or face removal.[30]

During contract negotiations between FCA and the Respondent in 2019, the parties agreed to dissolve the NTC and continue certain of the joint programs under different forms of trusts.[31]

ANALYSIS

I. IS THE GENERAL COUNSEL'S COMPLAINT BARRED BY SECTION 10(b)?

In its answer to the second consolidated amended complaint, the Respondent asserted as an affirmative defense that Section 10(b) of the Act barred the complaint.

Section 10(b) requires that a charging party file the initial charge in a matter within a 6-month statute of limitations; a charging party's failure to do so bars any subsequent complaint. *Masonic Temple Assn. of Detroit*, 364 NLRB No. 150, slip op. at 1 fn. 1 (2016); *Positive Electrical Enterprises, Inc.*, 345 NLRB 915, 918 (2005). The 6-month statute of limitations begins to run when a party has clear and unequivocal notice of the violation, not when a party sends

[29] At the time of the hearing, the Union's ethics officer was former NLRB Chairman Wilma Liebman. (R. Exh. 32.)

[30] Tr. 182–184. The Respondent conducted several audits, at least one of which occurred in 2018. (Tr. 194–196.) The NTC also implemented reforms in response to the fund misappropriation allegations in the plea agreements. They included 20 new policies, including ones governing credit card use, whistleblowing, vendor review, and facilities use. The NTC also filed a claim with its insurance carrier for reimbursement of the misappropriated funds, which was paid to the NTC. (Tr. 210–212.)

[31] Tr. 212.

conflicting signals or otherwise engages in ambiguous conduct. *CAB Associates*, 340 NLRB 1391, 1392 (2003). The 10(b) allegation is not jurisdictional, but instead is considered an affirmative defense. *Federal Management Co.*, 264 NLRB 107 (1982). The party alleging this affirmative defense has the burden of proof, which is met by demonstrating that the charge filer had actual or constructive knowledge of the unfair labor practice outside the 10(b) period. *ISS Facility Services, Inc.*, 363 NLRB No. 27, slip op. at 1 fn. 2 (2015).

On August 4, 2020, prior to the hearing in this case, the Respondent filed with the Board a motion to dismiss the complaint on Section 10(b) grounds. The UAW argued that Charging Parties Anolick, Keller, and Swanigan discovered the factual basis for their claims with Iacobelli's indictment on July 26, 2017. As a result, they were required to file and serve their charges with the Board by January 26, 2018, 6 months from that date. However, the Respondent was not served with the charges until January 29, 2018. On August 26, 2020, the Board denied the motion. Assuming arguendo that July 26, 2017 was the date all three Charging Parties had actual or constructive knowledge of the facts underlying their unfair labor practice charges, the Board found service of the charge on January 29, 2018 was timely. Because the day on which the unfair labor practice took place is not counted in computing the 6-month 10(b) limitation period, the Charging Parties' 10(b) period began to run on July 27, 2017, a Saturday. Furthermore, Section 102.2 of the Board's Rules and Regulations provides that, if the last day of a time period is a Saturday, Sunday, or holiday, then the period runs to the next Agency business day. That next day here was January 29, 2018. Accordingly, the charges were timely filed and served.

The Board's holding on the 10(b) issue is binding on me as the law of the case. *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 80 (2007), enfd. in part and remanded in part 522 F.3d 423 (D.C. Cir. 2008). The record evidence establishes that unit employees Keller and Swanigan became aware of the facts underlying their charges on July 26, 2017. Even if, as the Respondent argues, Anolick was found to have constructive knowledge of the potential unfair labor practice on July 26, 2017, rather than the actual notice she received in the fall of 2017, the outcome on the 10(b) issue is the same. If all the Charging Parties had actual or constructive notice of the underlying facts on July 26, 2017, the Board has found the charges timely filed and served. I apply that holding here and reject the 10(b) affirmative defense.[32]

II. ARE THE PLEA AGREEMENTS ADMISSIBLE AS SUBSTANTIVE EVIDENCE?

On August 26, 2020, the Respondent filed a motion in limine seeking to exclude the plea agreements of the FCA and UAW officials from the record. The Respondent contends that the plea agreements are inherently unreliable and uncorroborated hearsay. At the start of the

[32] The Respondent asks that I determine whether the Charging Parties had actual or constructive knowledge of their claims on July 26, 2017. In turn, the General Counsel argues that the Charging Parties did not have actual or constructive notice of the underlying facts until the DOJ filed Iacobelli's plea agreement on January 23, 2018. Given the Board's decision on the Respondent's motion to dismiss, I do not find it necessary to resolve that legal issue to evaluate the 10(b) defense.

hearing on August 28, 2020, counsel made oral arguments on the motion. Following that argument, I made a preliminary ruling that the plea agreements were admissible, but reserved ruling on the question of what use the General Counsel could make of the information contained in those agreements. I also ruled that I could take administrative notice of the criminal dockets for the cases where the FCA and UAW officials entered into plea agreements with DOJ. See, e.g., *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2 fn. 3 (2017); *Atelier Condominium*, 361 NLRB 966, 967 fn. 12 (2014). Again, I reserved ruling on what use the General Counsel could make of documents contained in those criminal dockets.[33]

The question of whether the General Counsel can use the plea agreements as substantive evidence is no small matter. It is a dispositive one. At the hearing, the General Counsel only called Charging Parties Anolick, Keller, and Swanigan as witnesses. The only issue their testimony addressed was the Respondent's 10(b) defense. The General Counsel did not call any of the FCA or UAW officials who pleaded guilty to criminal offenses after being indicted by the DOJ. The General Counsel also did not call any other FCA or UAW officials involved in the material events from 2010 to 2015. In fact, the General Counsel did not call any additional witnesses. Therefore, if the plea agreements are excluded, the General Counsel has no evidence to support the complaint allegations and the complaint must be dismissed.

The facts contained in the plea agreements unquestionably are hearsay. Thus, in order to get the plea agreements into the record as substantive evidence, the General Counsel either must identify Board precedent permitting such an admission or identify a Federal Rule of Evidence (FRE) rendering those statements as non-hearsay or establishing a hearsay exception.[34]

A. Are the Plea Agreements and the Remainder of the Federal Criminal Proceedings Admissible Under Board Precedent?

The General Counsel first contends that Board precedent permits me to take administrative notice not only of the plea agreements, but also the "entire criminal proceedings" for the FCA and UAW officials who pleaded guilty to federal offenses.

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[33] Tr. 17–27. I also advised counsel for the General Counsel at the hearing that he could file a stand-alone response to the motion in limine or address it in his post-hearing brief. (Tr. 222.) He chose the latter.

[34] In reaching this conclusion, I acknowledge that Sec. 10(b) of the Act, 29 U.S.C. § 160(b), states that the Federal Rules of Evidence shall be applied in Board proceedings "as far as practicable." See also NLRB Rules and Regulations, Sec. 102.39, and Statements of Procedure, Sec. 101.10(a). The Board likewise has held that it is not required to apply the FRE strictly. *International Business Systems*, 258 NLRB 181 fn. 6 (1981), enfd. mem. 659 F.2d 1069 (3d Cir. 1981). But not requiring a judge to apply the federal rules is not the same as prohibiting a judge from strictly applying them. In this case, where the General Counsel's entire substantive case is premised upon documents and hearsay within those documents, I find that strict adherence to the federal rules is appropriate, including to ensure fairness and due process for the Respondent.

Although not a frequent occurrence, the Board has considered the admissibility and use of convictions and guilty pleas in its proceedings. Most of the cases are from many moons ago, shortly after the legislative creation of the NLRB. The seminal case is *Republic Steel Corp.*, 9 NLRB 219, 387–388 (1938). The Board ordered an employer to reinstate individuals who struck due to the company's unfair labor practices. The employer contended that acts of violence by certain strikers rendered reinstatement an inequitable remedy. Following the hearing in the case, the Board granted the employer's motion to include in the record the guilty pleas of several employees for crimes committed in connection with the strike. In doing so, the Board stated: "In our opinion evidence that the strikers committed acts of violence is relevant on the issue of whether it would effectuate the policies of the Act to order their reinstatement. We will therefore take into consideration evidence of convictions and pleas of guilty of acts of violence committed by individual strikers in connection with the strike." The Board has reached the same conclusion in numerous other cases. See *Standard Lime & Stone Co.*, 5 NLRB 106, 116–117 (1938); *Berkshire Knitting Mills*, 46 NLRB 955, 1002–1004 (1943); *Overnite Transportation Co.*, 133 NLRB 1488, 1490–1491 (1961); *Bob's Ambulance Service*, 183 NLRB 961 (1970). In all of these cases, the Board considered convictions and guilty pleas for a very limited, remedial purpose: to determine whether reinstatement was an appropriate remedy.

In stark contrast, the General Counsel here is not seeking to admit just the crimes to which the FCA and UAW officials pleaded guilty for a remedial purpose. Rather, the General Counsel is attempting to use the factual bases from the plea agreements as substantive evidence to prove unfair labor practices occurred. The Board rejected this very notion in its *Republic Steel* decision. The Board stated it was admitting the convictions and guilty pleas, in lieu of live testimony about discriminatees' alleged criminal conduct, because of a concern that the Board was not equipped to investigate and prosecute criminal matters. Moreover, whether the discriminatees were entitled to reinstatement was a collateral matter in the case. The Board then noted that its conclusion did not apply to testimony concerning whether a respondent engaged in unfair labor practices, which was a "direct, not collateral," matter and was the Board's "proper duty to determine" through witness testimony. No subsequent Board case has permitted the use of factual statements in guilty pleas to establish a respondent's violation of the Act. I find nothing in *Republic Steel* and the other prior Board decisions that justifies such an extreme expansion in the evidentiary use of guilty pleas in unfair labor practice hearings.

The General Counsel also requests that I take administrative notice of "the entire criminal proceedings" of the indicted FCA and UAW officials. In support of this request, the General Counsel relies upon *Kings Harbor Health Care*, 239 NLRB 679 (1978). In that case, an administrative law judge ruled that the respondent's attorney had knowingly introduced a fabricated document into evidence and had attempted to induce a witness to give false testimony in the underlying unfair labor practice hearing. Although the attorney initially disputed the judge's findings with the Board, he later informed the Board that the U.S. Attorney's office for the Southern District of New York had indicted him and he entered a plea of guilty to one count of subornation of perjury. The Board then ruled: "Taking official notice of the…criminal proceedings, we find that the felony to which [the attorney] pleaded guilty constitutes misconduct of an aggravated character[.]" The Board ordered the attorney's

disbarment from practicing before the Board. In so holding, the Board received into the record only the indictment, the judgment, and the probation/commitment order. See also *Republic Steel Corp.*, supra (taking judicial notice only of convictions, guilty pleas, and associated sentences). Again, this Board precedent condones taking judicial notice of the crimes to which an individual pleaded guilty on a collateral, not direct, legal issue. The decision does not condone or permit the General Counsel's use of the entire criminal docket, in particular any other documents therein, as substantive evidence in this unfair labor practice proceeding.

Accordingly, I conclude that Board precedent, in particular *Republic Steel*, does not permit the admission of guilty pleas, and the facts contained in them, as substantive evidence. As a result, the next question is whether, under the Federal Rules of Evidence, statements of alleged facts in the plea agreements are admissible, either because they are not hearsay or are covered by any exception to the rule against hearsay.

B. Are the Plea Agreements Admissible Under Fed. R. Evid. 803(22) as a Judgment of a Previous Conviction?

The General Counsel next argues that the plea agreements, in their entirety, are admissible under FRE 803(22). In relevant part, FRE 803(22) excludes the following from the rule against hearsay:

> Evidence of a final judgment of conviction if:
>
> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment.

That the first two conditions have been met is not disputed by the parties. The U.S. District Court for the Eastern District of Michigan has accepted plea agreements and entered judgments of conviction against alleged Respondent agents Jewell, Mickens, King, and Johnson for conspiracy to violate the LMRA, in violation of 18 U.S.C. § 371. That crime is punishable by imprisonment for more than 1 year. In addition, the district court accepted plea agreements and entered judgments of conviction against FCA officials Iacobelli and Brown. Iacobelli likewise pleaded guilty to conspiracy to violate the LMRA in violation of 18 U.S.C. § 371. Brown pleaded guilty to misprision of a felony. The conspiracy and misprision of a felony crimes each was punishable by imprisonment for more than a year.

The Respondent argues that the third condition of FRE 803(22) bars the General Counsel from utilizing everything in the plea agreements to prove the substantive merits of the complaint allegations. Instead, consistent with the third condition, the Respondent contends

that the admissible portions of the plea agreements under the rule are limited to those portions which establish facts essential to the judgments of conviction.

Federal court decisions in cases similar to this one support the Respondent's argument.[35] In *Securities and Exchange Commission (SEC) v. Aragon Capital Management*, 672 F.Supp.2d 421 (S.D.N.Y. 2009), the SEC brought a civil action against a former executive of a corporation and the executive's family members for insider trading. Prior to the civil action, four individuals, including the executive's son, pleaded guilty to conspiring to commit securities fraud. At a plea allocution hearing in the criminal case, the son testified that he knew his father was breaching his fiduciary duty to the corporation by disclosing insider information to him, his father intended for him to profit on the information, and his trading therefore was unlawful. The district court ruled that this testimony was not admissible against the father under FRE 803(22) in the subsequent civil action, because the elements of the crime of conspiracy do not include that the conspirators achieve their unlawful objective. Thus, the father's actual transmission of insider information to his son was not essential to the son's judgment of conviction.

In *United States v. Anchor Mortgage Corp.*, No. 06–C–210, 2010 WL 1882018, at *3–*4 (N.D. Ill. 2010), the United States brought a civil suit against a corporation alleging a violation of the False Claims Act. That law penalizes knowingly submitting or conspiring to submit false or fraudulent claims to the federal government. The United States alleged that the corporation fraudulently procured mortgages insured by the U.S. Department of Housing and Urban Development (HUD). In a prior criminal case, an employee of the corporation pleaded guilty to mail fraud. In the subsequent civil trial, the district court ruled on summary judgment that the individual's judgment of conviction to mail fraud and the facts essential to that judgment were admissible under FRE 803(22). The court then looked at the elements of mail fraud: the existence of a scheme to defraud; the defendant's knowing participation in it; the defendant's intent to defraud the victim or to obtain the victim's money or property; and the defendant's use of the mail to carry out the scheme. Given those elements, statements in the individual's plea agreement concerning criminal conduct engaged in by the corporation, as well as the specific fraudulent transactions the individual engaged in, were not admissible. Neither category was essential to a mail fraud conviction.[36]

Thus, FRE 803(22) permits the admission of the judgments of conviction for the FCA and UAW officials named in the General Counsel's complaint. The judgments of conviction for Jewell, Mickens, King, Johnson, Iacobelli, and Brown were for conspiracy to violate the LMRA

[35] Board precedent essentially is nonexistent as to the application of FRE 803(22), meaning federal cases must provide guidance, even though they do not constitute precedent in Board proceedings absent a decision by the U.S. Supreme Court.

[36] See also *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871 (D.C. Cir. 2010) (judgment of conviction and plea agreement of corporation in federal criminal case were admissible in subsequent civil trial to show that the corporation and others submitted bids and made payments as part of unlawful bid-rigging conspiracy, because those facts were essential to the criminal judgment).

in violation of 18 U.S.C. § 371.[37] In addition, FRE 803(22) permits the admissibility for the truth of the matter asserted any facts contained in those plea agreements which were essential to the judgments. The next step, then, is to determine whether the facts relied upon by the General Counsel to support the complaint allegations fall into that essential category.

That determination begins with the elements to establish conspiracy to violate the LMRA under 18 U.S.C. § 371. Those elements are that: (1) the defendant entered into an agreement with at least one other person to defraud the United States, in this case to violate 29 U.S.C. § 186(a)(2) and (b)(1) of the LMRA; (2) the defendant knowingly and voluntarily joined the conspiracy; and (3) a conspiracy member committed at least one overt act in furtherance of the object of the conspiracy.[38] *United States. v. Mellen*, 393 F.3d 175, 180–181 (D.C. Cir. 2004); *United States v. Meyers*, 646 F.2d 1142 (6th Cir. 1981). The first LMRA provision, 29 U.S.C. § 186(a)(2), makes it unlawful for an employer or any person who acts in the interest of an employer to pay or agree to pay money or other things of value to a labor organization which represents employees of the employer. The second, 29 U.S.C. § 186(b)(1), makes it unlawful for any person to receive or agree to receive payments prohibited by the first provision.

The statements in the plea agreements relied upon by the General Counsel can be organized into four categories: (1) the legal conclusions underlying the judgments of conviction; (2) misuse of NTC credit cards; (3) the payment of the salaries of UAW officials utilizing NTC funds despite those officials not performing NTC work; (4) and specific, overt acts falling into one of the first three categories.[39]

In the first category, the plea agreements of Jewell, Mickens, King, and Johnson all state that the individuals, during various time periods when they served as representatives and employees of the UAW labor organization, knowingly joined a conspiracy where officers and employees of the UAW would willfully request, receive, and accept and agree to receive and accept money and things of value from persons acting in the interest of FCA. The plea agreement of Iacobelli similarly states that, during the time period when he served as an FCA executive, he knowingly and voluntarily joined a conspiracy in which FCA and its executives, including himself, agreed to pay and deliver, and willfully paid and delivered prohibited payments and things of value to UAW officers and employees.[40] These statements mirror the language in 18 U.S.C. § 371 and 29 U.S.C. § 186 and are nothing more than the legal conclusions underlying the judgments of conviction. They are not facts essential to the judgment that can be used as substantive evidence in this case. Furthermore, the statements indicating that FCA

[37] The guilty pleas to tax offenses and misprision of a felony likewise are admissible, but are not relevant to evaluate the General Counsel's complaint allegations.

[38] The plea agreements themselves also set forth this definition of the elements of the offense.

[39] In evaluating this legal question, I assess only the plea agreement statements which the General Counsel relied upon in the post-hearing brief to demonstrate a violation of the Act. Those facts are contained in the plea agreements of Jewell, Mickens, King, Johnson, Iacobelli, and Brown, not Durden or Morgan. I also limit the analysis to the judgments of conviction relevant to the substantive allegations in this case: conspiracy to violate the LMRA under 18 U.S.C. § 371.

[40] GC Exhs. 16 (p. 2), 19 (p. 2), 21 (p. 2), 22 (p. 3).

officials actually paid and UAW officials actually received prohibited things of value are not essential to the judgment for an additional reason. It is immaterial to a conspiracy conviction that the object of the conspiracy, here the prohibited payment exchange, is achieved. The only requirement is that the individuals agreed to try and achieve it. *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004); *SEC. v. Aragon Capital*, supra.

Next in the same category, the General Counsel relies upon additional statements in the plea agreements of Iacobelli and Brown regarding the purpose of the prohibited payments. Iacobelli's plea stated that the payments were made in an "effort to obtain benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective-bargaining agreement between FCA and the UAW." Brown's plea stated that he knew the purpose of the payments was to "grease the skids in order to obtain benefits, advantages, and concessions in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW." These facts also are not essential to the judgments of conviction. The object of the conspiracy for the guilty pleas was not for FCA officials to obtain contract concessions and other preferential treatment from UAW officials. Rather, the object of the conspiracy, as the judgments of conviction establish, was to violate the LMRA's prohibitions in 29 U.S.C. 186(a)(2) and (b)(1) on payments from FCA officials to UAW officials. Whatever purpose those payments had, it was not essential to the judgments of conviction and is inadmissible.[41]

In the misuse of NTC credit cards category, the General Counsel relies upon a statement that, as part of the conspiracy, Iacobelli and other FCA executives and employees used the bank accounts and credit card accounts of the NTC to benefit UAW officers and employees. The plea agreement of Johnson similarly states that Iacobelli, Durden, and other FCA officials encouraged Johnson and other UAW officials to use their NTC credit cards for personal purchases and expenses.[42] These facts are not essential to the judgments, because the means and methods used to further a conspiracy need not be shown to establish a violation of 18 U.S.C. § 371. *United States v. Recognition Equipment, Inc.*, 711 F.Supp. 1, 5 (D.D.C. 1989).

In the salary charge back category, the General Counsel relies upon statements in Iacobelli's plea agreement that he and other FCA executives authorized the transfer of money from the NTC to the UAW. This purportedly was reimbursement for the salaries of UAW employees assigned to the NTC. However, many of those UAW employees provided no services to the NTC. Instead, the salary reimbursements were a political gift to Holiefield. Similarly, the General Counsel relies upon a statement in Brown's plea agreement that FCA executives authorized UAW officials to offer "sham employment" at the NTC to their friends, family, and allies. The individuals were classified as being on special assignment to the NTC,

[41] I further note that the DOJ did not charge the FCA officials with a conspiracy to violate 29 U.S.C. § 186(4), which prohibits employers from making payments to labor organizations "with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization."

[42] GC Exhs. 17 (pp. 5–6), 21 (p. 7).

but, in fact, did little to no work for the NTC. Again, these facts go to the means and methods used to further a conspiracy to provide unlawful payments to the UAW officials. They are not essential to the judgments of conviction and thus are inadmissible.[43]

Finally, as to overt acts, the General Counsel argues that each of the overt acts contained in the plea agreements where FCA offered to provide, and did provide, assistance to the Respondent, as well as those actions where the UAW accepted that assistance, are admissible under FRE 803(22). The General Counsel does not cite to any legal authority which supports this argument. As to specific overt acts the General Counsel relies upon and wants admitted, the first are statements of Jewell, Mickens, and King concerning their use of the NTC credit cards for their own or other UAW officials' personal expenses and, in Jewell's case, his approval of other UAW officials' use of the cards in that manner. Another overt act relied upon was Iacobelli's authorization of the payment of the personal expenses of Holiefield and other UAW officials using NTC credit cards. Finally, the General Counsel relies on a statement in Johnson's plea that FCA officials paid the salaries of UAW employees who were nominally assigned to the NTC, but spent most of their work time performing UAW job duties.[44]

The Respondent argues that all of the overt acts in the plea agreements are not essential to the judgments, because a conviction for conspiracy to violate the LMRA requires only one overt act. The Respondent relies upon *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780, 790 (D.C. Cir. 1982). In that case, the appellate court affirmed a trial court's conclusion that a general verdict by a jury finding an individual guilty of conspiring to violate the Federal Travel Act prevented admission of the overt acts alleged as part of the conspiracy in a subsequent civil suit. The trial court concluded that, from the general verdict, it could not determine which overt acts the jury relied upon for the conviction. The Respondent also relies upon the U.S. Supreme Court decision in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951). In that estoppel case, the Court noted that a general verdict by a jury convicting an individual of a conspiracy offense without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. Furthermore, because all of the overt acts charged need not be proved for a conviction, the verdict does not establish that a defendant used all the means charged or any particular one.[45]

The decisions in *Columbia Plaza* and *Emich* make clear that, unless it could be determined which overt acts a jury relied upon in convicting a defendant of a criminal offense, those acts could not be admitted as substantive evidence in a subsequent civil proceeding. This case does not involve criminal convictions following jury trials, but rather plea agreements which had to be accepted by a judge. Thus, in order to get specific overt acts admitted into evidence, the General Counsel, as the party seeking admission, needed to proffer evidence establishing which

[43] GC Exhs. 17 (pp. 6–7), 20 (p. 4).

[44] GC Exhs. 16 (p. 7), 17 (p. 9), 19 (p. 7–8), 21 (p. 10), 22 (p. 12).

[45] *Emich* did not involve 18 U.S.C. § 371 or FRE 803(22) but did raise the question of the use of a criminal conviction in a subsequent civil trial to prove complaint allegations. Thus, it is analogous to the situation presented in this case.

overt acts the district court judges relied upon in accepting the plea agreements in the criminal cases of the seven FCA and UAW officials. No such evidence was presented and the plea agreements, standing alone, do not answer the question. Thus, the overt acts are not admissible under FRE 803(22).

Accordingly, I conclude that the judgments of conviction are admissible under FRE 803(22), but the facts from the plea agreements relied upon by the General Counsel are not.

C. Are Statements of Fact in the Plea Agreements Adoptive Admissions under FRE 801(d)(2)(B)?

The General Counsel next contends that factual statements in the plea agreements are admissible non-hearsay because, under FRE 801(d)(2)(B), the Respondent adopted those statements such that they constitute admissions of a party opponent.

Under FRE 801(d)(2)(B), a statement offered against an opposing party is not hearsay if the statement "is one the party manifested that it adopted or believed to be true." The General Counsel argues that the Union adopted the truthfulness of the facts in the plea agreements filed in court by the DOJ, because of the actions taken and reforms implemented by the Union after learning of those agreements. This argument fails for both factual and legal reasons.

As to the facts, the Respondent investigated and verified that the NTC had paid funds to the UAW for work that certain, unidentified UAW appointees to the NTC had not performed. The Respondent then implemented reforms to its business practices to reduce the likelihood of future fund misappropriation. However, the record evidence is unclear as to the exact timing of the investigation and reform implementation. It appears that the Respondent was aware of the criminal allegations prior to the release of Iacobelli's indictment on July 26, 2017 and already had taken some actions prior to then. The evidence does not establish that the Respondent's actions were a direct response to it learning of the plea agreements.

On the legal side, the General Counsel relies upon three cases. *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), involved a lawsuit alleging that an individual's death in an airplane crash was caused by the defendant's willful misconduct and negligence. The parties disputed the cause of the plane crash. The U.S. Court of Appeals for the Second Circuit held that the trial court erred in excluding from evidence a report setting forth the findings of the airline's investigation into the cause of the accident in question. That report contradicted the airline's assertions at trial. The court found that the report contained adoptive admissions concerning the cause of the crash, in part because the airline implemented remedial recommendations therein. Here, the General Counsel is not seeking to introduce an investigative report of the Respondent into whether any of the alleged crimes committed by its officials actually occurred. The Respondent also has not taken the position that those crimes did not occur.

In *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988), the U.S. Court of Appeals for the First Circuit upheld the conviction of an individual for extorting money from the Church of Scientology. On appeal, the defendant claimed the trial court erred in not admitting briefs filed by the DOJ in other cases. The briefs contained assertions about the Church of Scientology which cast the church in a radically different (i.e. negative) light than in the defendant's case. The appeals court ruled the DOJ briefs filed in other cases were adoptive admissions under FRE 801(d)(2)(B), because the DOJ manifested its belief in the substance of the contested documents by submitting them to other courts to show the truth of the matters contained therein. Similarly, in *United States v. Ganadonegro*, 854 F. Supp. 2d 1088, 1121 (D.N.M. 2012), the U.S. District Court for New Mexico ruled that a DOJ prosecutor's statements during opening and closing arguments in a previous mistrial were an adoptive admission and admissible in the defendant's subsequent retrial. The defendant sought to use the statements in his retrial to demonstrate that the government was taking an inconsistent position regarding his guilt. I find both of these cases inapposite to this one. Neither case involved an adoptive admission based upon remedial measures taken by an entity after the discovery of fund misappropriation. Moreover, the General Counsel is not seeking to introduce the plea agreements to contradict an assertion or inconsistent position taken by the Respondent in this case. The General Counsel also is not seeking to bind the DOJ based upon DOJ's filing of the plea agreements in the federal court cases. Rather, he is seeking to bind the Respondent, which was neither a party to the plea agreements nor involved in the criminal prosecution of its officials.

Beyond the inapplicability of these cases to this one, the Respondent further argues that FRE 407 prevents the admission of the plea agreements based upon the union's remedial measures. That rule, in its current form, states in relevant part: "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . culpable conduct." The advisory committee notes for the rule explain that it incorporated conventional doctrine which excludes remedial measures as proof of an admission of fault.

Courts have applied FRE 407 to exclude remedial measures in business practices and procedures to prove guilt. Most insightful to the situation here are cases involving economic loss due to securities fraud. For example, in *Krouner v. American Heritage Fund, Inc.*, 899 F. Supp. 142, 147 (S.D.N.Y. 1995), the plaintiff brought a class action alleging the fund violated federal securities statutes by omitting the speculative nature of its investment techniques from its filings with the SEC. In granting the defendant's motion to dismiss, the court declined to consider a fund prospectus issued after the initiation of the lawsuit which included new information about the speculative nature of its investments. In *Higginbotham v. Baxter International, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007), the plaintiff brought a class action alleging violations of federal securities laws, after the defendant's announcement that it would restate 3 years of earnings due to fraud by its subsidiary in Brazil. After learning of the fraud, the employer solicited a report from an accounting firm for recommendations on how to "beef up its financial controls." In affirming the trial court's dismissal of the complaint, the appellate court refused to consider the accounting firm's report as substantive evidence. The court ruled that the report was a subsequent remedial measure under FRE 407 and could not be relied upon

to establish liability. See also *Hickman v. GEM Insurance Co.*, 299 F.3d 1208, 1214 (10th Cir. 2002); *Alimenta (U.S.A.), Inc. v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984).

Considering these decisions, I conclude that, even if the General Counsel had established the Respondent's reforms were in response to the plea agreements, FRE 407 bars the use of the agreements to prove culpable conduct by the Respondent, i.e. a violation of the Act. The Respondent's reforms were remedial measures taken after it learned of the criminal allegations against the FCA and UAW officials. In the securities fraud cases, the plaintiffs suffered financial harm due to alleged fraud. To establish that fraud, the courts did not permit them to introduce remedial measures that the defendants took to reduce the possibility of fraud in the future. Here, the General Counsel is alleging that FCA bargaining-unit employees, including Anolick, Keller, and Swanigan, suffered financial harm due to union officials' misappropriation of NTC funds. The Union's reforms likewise were intended to eliminate or reduce the possibility of similar fraud going forward. The General Counsel cannot use those reforms to establish the alleged misappropriation of NTC funds.

For all these reasons, I conclude that the Respondent did not adopt the factual statements in the plea agreements. Thus, those statements are not admissible under FRE 801(d)(2)(B).[46]

D. Are the Plea Agreements Admissible Under the Residual Exception of Fed. R. Evid. 807?

Finally, the General Counsel argues that the plea agreements are admissible under FRE 807. This residual hearsay exception rule permits the admission of hearsay statements not otherwise admissible under an exception in FRE 803 or 804, if:

[46] In addition to adoptive admission, the General Counsel argues that the statements in the plea agreements are admissions of a party opponent under the remaining subsections of FRE 801(d)(2). Those subsections exclude from hearsay any statements offered against an opposing party that were made by the party in an individual or representative capacity; by a person whom the party authorized to make a statement on the subject; or by the party's agent or employee within the scope of that relationship while it existed. All of these hearsay exceptions would require the General Counsel to establish that Jewell, Mickens, King, and Johnson were Sec. 2(13) agents of the Respondent at the time they entered into the plea agreements. As described in the facts section, the four entered those agreements between August 29, 2017 and April 2, 2019. However, the General Counsel's complaint alleges that the four individuals were agents of the Respondent during different time periods from January 1, 2010 and December 31, 2016 when the alleged unlawful conduct occurred. It does not allege that they were agents on the various dates they entered into the plea agreements. Although the General Counsel argues that the Respondent failed to show that the individuals no longer were employed by the Union when they entered the plea agreements, the burden of establishing that the individuals were agents when entering the plea agreements rests on the party asserting it, here the General Counsel. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). The General Counsel has not demonstrated that the individuals entered into the plea agreements during a time when an agency relationship with the Respondent existed. Accordingly, the plea agreements also are not admissible pursuant to FRE 801(d)(2)(A), (C), or (D). *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000); *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165, 176 (1997). See also *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 43 fn. 3 (2d Cir. 1976).

> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[47]

Assuming arguendo that the first condition is satisfied here, I nonetheless decline to admit the plea agreements under FRE 807, because the second condition has not been satisfied. The plea agreements are significantly less probative than other evidence the General Counsel could have reasonably obtained and presented, namely the live testimony of any of the eight individuals who entered into those agreements. At the hearing, the General Counsel conceded that he had not subpoenaed those individuals to testify. One reason given was that some of the individuals might still have been in prison (although that had not been confirmed). Even if so, the Board and judges have approved the taking of testimony from witnesses who are incarcerated, both in person and using video technology.[48] See *MPE, Inc.*, 09–CA–084228, unpub. Board order dated January 29, 2015 (2015 WL 400660); *Mar-Jam Supply Co.*, 337 NLRB 337, 341 fn. 1 (2001). The other reason given was that the General Counsel did not view any of the individuals as reliable witnesses. If that is so, then the reliability of the statements in the plea agreements also would be called into doubt.[49] Moreover, live testimony would be more probative with unreliable witnesses, because it would have allowed for their impeachment with their plea agreements, a point the General Counsel acknowledged. It also would have allowed for more robust and detailed testimony than the statement of facts in the plea agreements. It would have permitted the cross examination of the witnesses by the Respondent. And it would have permitted the judge to observe the witnesses' testimony and evaluate credibility.

As to the second prong of the rule, the General Counsel claims a lack of ability or resources to obtain the evidence DOJ did to establish criminal liability. But the General Counsel did not need to obtain and present all of the criminal case evidence. The General Counsel is responsible for and needed only to present evidence sufficient to establish a violation of Section

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[47] FRE 807 was amended effective December 1, 2019 to reflect this current language and the amended rule was in effect at the time of the hearing in this case. In addition, although FRE 807 also contains a requirement that a proponent give an adverse party advance notice of the intent to offer a statement under this rule, the Board does not impose such a requirement. *Sheet Metal Workers Local 28 (Borella Bros.)*, 323 NLRB 207, 209 fn. 2 (1997).

[48] The entire hearing in this case was conducted via videoconferencing due to the COVID-19 pandemic. Even if the pandemic would have precluded the testimony of witnesses currently in prison, the General Counsel made no attempt to obtain that testimony or delay its taking until such time that it safely could be done.

[49] The Respondent also correctly points out that a defendant signing a plea agreement may adopt facts the government wants to hear in exchange for a lesser sentence or other benefit. *United States. v. Vera*, 893 F.3d 689, 693 (9th Cir. 2018); see also *Lipman Bros., Inc.*, 147 NLRB 1342, 1360 fn. 18 (1964). This calls into question the trustworthiness of the factual statements in the plea agreements.

8(b)(1)(A), not conspiracy to violate the LMRA or the related tax offenses. Once aware of the plea agreements and the individuals who entered into them, the General Counsel had the ability to obtain live testimony of the involved individuals by subpoenaing them to testify at the hearing. Those individuals could have been questioned concerning any financial inducements paid to or received by them or other officials of the Respondent.

Accordingly, the plea agreements are not admissible under FRE 807, because they are less probative than live testimony would have been. *United States v. Sinclair*, 74 F.3d 753, 758–760 (7th Cir. 1996); *United States v. Hawley*, 562 F. Supp. 2d 1017, 1052–1054 (N.D. Iowa 2008).

E. Conclusion Regarding the Admissibility of Criminal Case Documents

To summarize, then, concerning the admission of documents from the DOJ criminal cases, I conclude that the judgments of conviction for Jewell, Mickens, King, Johnson, Iacobelli, Brown, and Durden are admissible under FRE 803(22). However, any factual statements in the plea agreements are inadmissible hearsay to which no exception advanced by the General Counsel applies. Therefore, I grant the Respondent's motion in limine and exclude the plea agreements from the record.

III. DID THE RESPONDENT VIOLATE SECTION 8(B)(1)(A) BASED UPON THE CRIMINAL CONDUCT OF JEWELL, KING, MICKENS, AND JOHNSON?

In the second amended consolidated complaint, the General Counsel alleges that, during contract negotiations, implementation, and administration between 2010 and 2015, the Respondent unlawfully received and accepted financial support from FCA. The complaint alleges this conduct violates Section 8(b)(1)(A) of the Act, because the Respondent (1) failed to fairly represent the Charging Parties and all other unit employees for reasons that are arbitrary, discriminatory, or in bad faith; (2) breached the fiduciary duty it owes to the Charging Parties and all unit employees; and (3) engaged in conduct inherently destructive of employee rights under the Act.

Under Section 8(b)(1)(A), a union owes a duty of fair representation to all of the employees it represents and breaches that duty when its action or inaction is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Miranda Fuel Co.,* 140 NLRB 181, 1851962). Actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991). Unsurprisingly, a union representative's receipt of bribes or kickbacks is an act of bad faith which breaches the duty of fair representation in violation of Section 8(b)(1)(A). *Jackson Engineering Co.*, 265 NLRB 1688 (1982). Moreover, such conduct would call into question collective-bargaining negotiations and agreements between a union and an employer which occurred during the time of unlawful payments. Id. at 1689. The conduct also would negatively impact the statutory rights of all unit employees and be inherently destructive,

because it undermines their faith in the bargaining process and makes negotiations seem futile. See *International Paper Co.*, 319 NLRB 1253, 1266–75 (1995).

To demonstrate an 8(b)(1)(A) violation, the General Counsel's complaint alleges that the Respondent accepted financial support from FCA when Union agents, including Holiefield, Jewell, Mickens, King, and Johnson, charged NTC credit cards for personal expenses and paid the salaries of Union officials who were not assigned to work at the NTC, but rather served on the Respondent's national negotiation committee. Proving these allegations necessarily requires a showing that those payments were made and accepted. However, the judgments of conviction prove that the named individuals knowingly agreed to join a conspiracy whereby FCA officials would make payments to UAW officials prohibited by 29 U.S.C. § 186. What these judgments of conviction do not prove is that FCA officials actually made prohibited payments to UAW officials or that UAW officials accepted those payments. It is immaterial to a conspiracy conviction that the object of the conspiracy, here the prohibited payment exchange, is achieved. The only requirement is that the individuals agreed to achieve it. *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004). Without proof in the record that the payments were made, the General Counsel has not shown that the alleged violation of Section 8(b)(1)(A) occurred.[50]

CONCLUSIONS OF LAW

1. The Respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. FCA US LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent did not violate Section 8(b)(1)(A) in any of the manners alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

[50] In light of this conclusion and my ruling on the inadmissibility of the factual statements in the plea agreements, I decline to address the parties' dispute over whether Holiefield, Jewell, Mickens, King, and Johnson were acting as Sec. 2(13) agents when they engaged in the alleged criminal conduct.

[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 26, 2021.

Charles J. Muhl
Administrative Law Judge